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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/358,280	07/21/1999	STEVEN M. UTTER	MISTY-52064	1354

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EXAMINER

KIM, CHRISTOPHER S

ART UNIT PAPER NUMBER

3752

DATE MAILED: 06/15/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/358,280

Applicant(s)

UTTER, STEVEN M.

Examiner

Christopher S. Kim

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 09 April 2004.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 5,7-10,18-21 and 23 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 5,7-10,18-21 and 23 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- 1) ☐ Certified copies of the priority documents have been received.
 - 2) ☐ Certified copies of the priority documents have been received in Application No. _____.
 - 3) ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: _____

DETAILED ACTION

Response to Amendment

1. Amendment filed April 9, 2004 is acknowledged.
2. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.
3. Applicant's amendment, in the claim section, fails to indicate that claim 22 has been canceled. Applicant is notified that future amendments failing to indicate canceled claims will be considered non-responsive.

Priority

4. Applicant has not complied with one or more conditions for receiving the benefit of an earlier filing date under 35 U.S.C. 120 and/or 121 as follows:

The later-filed application must be an application for a patent for an invention which is also disclosed in the prior application (the parent or original nonprovisional application or provisional application); the disclosure of the invention in the parent application and in the later-filed application must be sufficient to comply with the requirements of the first paragraph of 35 U.S.C. 112. See *Transco Products, Inc. v. Performance Contracting, Inc.*, 38 F.3d 551, 32 USPQ2d 1077 (Fed. Cir. 1994).

Claims 7, 9, 10, 18-21 and 23 have not been granted the benefit of the earlier filing date.

Drawings

5. The proposed drawing correction and/or the proposed substitute sheets of drawings, filed on October 23, 2000 and April 17, 2003 have been approved. A proper drawing correction or corrected drawings are required in reply to the Office action to avoid abandonment of the application. The correction to the drawings will not be held in abeyance.

Claim Rejections - 35 USC § 102

6. Claims 5, 8, 9, 18, 19, 21 and 23 are rejected under 35 U.S.C. 102(b) as being anticipated by Anderson (2,853,212).

With respect to claims 5, 8, 9 and 23, Anderson discloses an apparatus comprising: a pressurizable container 10; means 13 for pressurizing the container; a water conduit 34 (a first conduit - portion of conduit 34 inside container 10; a second conduit - portion of conduit 34 outside container 10); a spray nozzle (column 3, lines 42); a restrictive valve (inherent in order to build up the pressure in container 10); a means for sealing 16.

With respect to claims 18, 19 and 21, Anderson discloses an apparatus comprising: a pressurizable container 10; a manual pump 13; a means for delivering fluid (spray nozzle); a means for controlling the emission of evaporative mist (valve, which must be inherent to build up the pressure in container 10); a first conduit (portion of conduit 34 inside container 10); a second conduit (portion of conduit 34 outside

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container 10); a means for hands-free directing (ability for tube 34 to hang and point the nozzle downward).

Intended use recitation such as "for cooling a local area in the vicinity of a person by evaporative cooling" does not differentiate the claimed apparatus from a prior art apparatus satisfying the claimed structural limitations

Functional recitation such as "said spray nozzle delivering an evaporative cooling mist of water in the vicinity of a person" has not been given patentable weight because it is narrative in form. The functional recitation merely requires the ability to so perform.

7. Claims 5, 8, 18, 19, 21 and 23 are rejected under 35 U.S.C. 102(b) as being anticipated by Cushing (4,911,339).

With respect to claims 5 and 23, Cushing discloses an apparatus comprising: a pressurizable container 16; means 40 for pressurizing the container; a water conduit 18, 51, 72 (a first conduit 72; a second conduit 18, 51); a spray nozzle 20; a restrictive valve 46; a means for sealing 36,70.

With respect to claims 18, 19 and 21, Cushing discloses an apparatus comprising: a pressurizable container 16; a manual pump 40; a means for delivering fluid (spray nozzle) 20; a means for controlling the emission of evaporative mist (valve) 46; a first conduit 72; a second conduit 18, 51; a means for hands-free directing (clip) 24.

Claim Rejections - 35 USC § 103

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8. Claims 5, 8, 9, 18, 19, 21 and 23 are rejected under 35 U.S.C. 103(a) as being unpatentable over Anderson (2,853,212) in view of Norman (842,689).

This rejection is on the basis that applicant believes that a valve is not inherent in Anderson.

With respect to claims 5, 8, 9 and 23, Anderson discloses an apparatus comprising: a pressurizable container 10; means 13 for pressurizing the container; a water conduit 34 (a first conduit - portion of conduit 34 inside container 10; a second conduit - portion of conduit 34 outside container 10); a spray nozzle (column 3, lines 42); a means for sealing 16.

With respect to claims 18, 19 and 21, Anderson discloses an apparatus comprising: a pressurizable container 10; a manual pump 13; a means for delivering fluid (spray nozzle); a first conduit (portion of conduit 34 inside container 10); a second conduit (portion of conduit 34 outside container 10); a means for hands-free directing (ability for tube 34 to hang and point the nozzle downward).

Intended use recitation such as "for cooling a local area in the vicinity of a person by evaporative cooling" does not differentiate the claimed apparatus from a prior art apparatus satisfying the claimed structural limitations

Functional recitation such as "said spray nozzle delivering an evaporative cooling mist of water in the vicinity of a person" has not been given patentable weight because it is narrative in form. The functional recitation merely requires the ability to so perform.

A valve must be inherent in Anderson for the device to operate, but if applicant believes that Anderson does not disclose a valve in tube 34, Norman discloses a spray

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nozzle and valve 8. It would have been obvious to a person having ordinary skill in the art at the time of the invention to have provided the valve of Norman to the device of Anderson to enable buildup of pressure and to control the release of water/solution.

9. Claim 10 is rejected under 35 U.S.C. 103(a) as being unpatentable over Cushing (4,911,339).

Cushing in view of Rosenberg discloses the limitations of the claimed invention with the exception of ice. It would have been obvious to a person having ordinary skill in the art at the time of the invention to have added ice to the container of Cushing to dispense ice water.

10. Claims 7 and 20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Cushing (4,911,339) in view of Shurnick et al. (4,852,781).

Cushing differs from what is claimed in the means secured to the misting apparatus for attaching the misting apparatus to a person's waist. Shurnick et al. discloses a means 27 for securing a bottle to a part of a person's body (waist shown in figure 1). It would have been obvious to a person having ordinary skill in the art at the time of the invention to have replaced cage 30 of Cushing with the means 27 of Shurnick et al. to attach the device of Cushing to a runner.

11. Claim 9 is rejected under 35 U.S.C. 103(a) as being unpatentable over Cushing (4,911,339) in view of Anderson (2,853,212).

Cushing discloses the limitations of the claimed invention with the exception of the manual piston type pump. Norman discloses a piston pump 7, 11, 12, 13, 17. It would have been obvious to a person having ordinary skill in the art at the time of the

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invention to have replaced the bellows pump of Cushing with the piston pump of Norman to provide faster compression.

Response to Arguments

12. Applicant's arguments filed April 9, 2004 have been fully considered but they are not persuasive.

In response to applicant's swearing behind Cushing, Claims 7, 9, 10, 18-21 and 23 have not been granted the benefit of applicant's earlier filing date because applications 07/927,231; 07/698,356; 07/376,380 do not sufficiently disclose the claimed invention to comply with the requirements of the first paragraph of 35 U.S.C. 112.

Applicant's arguments are not commensurate in scope with claims 7, 9, 10, 18-21 and 23. Applications 07/927,231; 07/698,356; 07/376,380 do not sufficiently disclose all the limitations of claims 7, 9, 10, 18-21 and 23.

In response to applicant's arguments directed to functional recitations in narrative form, such recitation only requires the mere ability to so perform.

In response to applicant's argument that the prior art does not disclose a "spray nozzle capable of delivering an evaporative cooling mist" or "means for delivering fluid as a continuous evaporative mist", the dictionary defines "mist" as a fine spray. "Fine spray" is a relative term. Applicant's claims nor specification limits nor defines "mist". Fluids, especially water, naturally and inherently evaporate, especially when sprayed. Evaporation inherently has a cooling effect.

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Conclusion

13. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Christopher S. Kim whose telephone number is (703) 308-8336. The examiner can normally be reached on Monday - Thursday, 6:30 AM - 5:00 PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Michael Y. Mar can be reached on (703) 308-2087. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).



Christopher S. Kim
Primary Examiner
Art Unit 3752

CK